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ALEXANDER L. STEVAS,
CLERK

No. 83,2037

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF LAMBERTVILLE,

Appellant,

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION,

Appellee.

ON APPEAL FROM THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

BRIEF FOR THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

Don Horowitz
Deputy General Counsel

Arnold H. Zudick
Staff Attorney

Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608
(609) 292-9830

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 83,2037

CITY OF LAMBERTVILLE, Appellant

v.

LAMBERTVILLE POLICEMEN'S ASSOCIATION,

Appellee.

ON APPEAL FROM THE NEW JERSEY

SUPERIOR COURT, APPELLATE DIVISION

MOTION TO DISMISS OR AFFIRM

BRIEF FOR THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OF NEW JERSEY

TO the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Now comes the Public Employment Relations Commission, an administrative agency of the State of New Jersey, and respectfully moves before this Court, pursuant to Rule 16 of the Rules of this Court, for an order dismissing the appeal filed by the City of Lambertville in the above-captioned matter upon the following grounds:

1. The federal question sought to be reviewed was not timely or properly raised and was not expressly or impliedly passed upon by the decisions below;

2. The judgment below was not rendered by the highest court of the State of New Jersey in which review could be had;

3. The appeal does not present a substantial federal question.

In the alternative, the Public Employment Relations Commission moves for an order affirming the order of the

Superior Court of New Jersey, Appellate Division granting summary disposition and enforcing the order issued by the Public Employment Relations Commission.

Due to special circumstances, the Public Employment Relations Commission is represented in all judicial proceedings by its Office of General Counsel, rather than the Attorney General of New Jersey. Included in the Appendix to this motion is a copy of the appointment of Don Horowitz, Esq., Deputy General Counsel to the Public Employment Relations Commission, as Special Counsel, pursuant to N.J.S.A. 52:17A-13, made by the Attorney General of the State of New Jersey and approved by the Governor of New Jersey.

In support of this motion, the Public Employment Relations Commission shall rely upon the legal argument set forth herein.

OPINIONS BELOW

The written decision of the New Jersey Public Employment Relations Commission appears at Appendix "C" of Appellant's Jurisdictional Statement.

The form order of the Superior Court of New Jersey, Appellate Division, summarily affirming and enforcing the decision and order of the Commission, appears as Appellant's Appendix "B".

The order of the Supreme Court of New Jersey denying Appellant's Petition for Certification to review the order of the Appellate Division appears as Appellant's Appendix "A".

STATEMENT OF THE CASE

On June 21, 1982, the City of Lambertville and the Lambertville Policemen's Association entered into a collective negotiations relationship pursuant to the New Jersey Employer-Employee Relations Act

(N.J.S.A. 34:13A-1, et seq.), when the City recognized the Association as the exclusive majority representative for all its full-time police patrol officers and sergeants. On that same date, the City and the Association entered into a collectively negotiated agreement covering the police officers' terms and conditions of employment. The clause setting forth the duration of the agreement stated:

> This agreement shall be retroactive to January 1, 1982 and shall continue in force and effect until December 31, 1982 or until a successor agreement is signed.

A new form of government (Small Municipality Plan C) took effect in Lambertville on January 1, 1983. Thereafter, the City and the Association negotiated in an effort to reach a new agreement.[1/] The Commission appointed a mediator to assist the parties, but negotiations reached an impasse and a petition to

initiate compulsory interest arbitration, pursuant to N.J.S.A. 34:13A-14, et seq., was filed with the Commission on June 14, 1983.[2/]

On June 20, 1983, the City filed a Petition for Scope of Negotiations Determination asking the Commission to pass upon the validity of the duration clause in view of the change in the form of City government. Prior to issuing its formal decision, the Commission cited both parties to N.J.S.A. 34:13A-21 (quoted in Appellant's Jurisdictional Statement at p. 4), and noted that the statute was probably dispositive of the question raised by the petition.

The City nonetheless requested a formal determination. It filed a brief with the Commission setting forth two arguments: (1) the duration clause could not extend beyond the expiration date of December 31, 1982 and thus did

not bind the successor government which took office on January 1, 1983; and (2) extrinsic evidence was necessary to ascertain the true intent of the parties in agreeing upon the duration clause. No argument was made that N.J.S.A. 34:13A-21 violated U.S. Const. Art. I, Sec. 10.

On August 16, 1983, the Commission issued its decision. It held that the duration clause was valid since it mirrored the requirement of N.J.S.A. 34:13A-21 that existing terms and conditions of employment remain in effect until interest arbitration proceedings to produce a new agreement have been completed. The Commission also ordered the City to engage in interest arbitration proceedings.

The City appealed to the New Jersey Superior Court, Appellate Division and moved for a stay of the Commission's

decision. The Commission cross-moved, pursuant to R. 2:8-3(b) of the New Jersey Court Rules,[3/] for summary disposition of the appeal and also applied for enforcement of its order pursuant to N.J.S.A. 34:13A-5.4(f).[4/]

The City filed separate briefs in opposition to both of the Commission's applications. Neither brief questioned the validity of N.J.S.A. 34:13A-21 or cited U.S. Const. Art. I, Sec. 10. The Attorney General of New Jersey was served with a copy of the Notice of Appeal to the Appellate Division and the various motions. The Attorney General declined to participate in the case because "PERC's General Counsel is representing the Agency and...there is no challenge to the constitutionality of any statute or regulation of the State." (Letter of October 18, 1983, PERCmal,[5/] emphasis supplied).

On December 7, 1983, the Appellate Division, per the Hon. John W. Fritz, Presiding Judge, granted both the Commission's applications for summary affirmance and enforcement of its order. (Appellant's Appendix "B")

The City filed a Petition for Certification with the New Jersey Supreme Court, pursuant to R. 2:12-3 of the New Jersey Court Rules. This rule permits discretionary review of final judgments. In its petition, the City, for the first time, cited U.S. Const. Art. I, Sec. 10. It did not, however, attempt to proceed under R. 2:2-1(a)(1) which permits an appeal as of right "in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State...." On March 19, 1984, the New Jersey Supreme Court, per The Honorable Robert W. Wilentz, Chief Justice,

denied the City's petition with costs.

(Appellant's Appendix "A")

ARGUMENT

POINT I: THE COURT SHOULD DISMISS THIS APPEAL SINCE THE APPELLANT DID NOT PRESENT ITS CONSTITUTIONAL CLAIM TO THE PUBLIC EMPLOYMENT RELATIONS COMMISSION OR THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY AND NEITHER TRIBUNAL CONSIDERED SUCH A CLAIM.

This Court is empowered to grant a motion to dismiss an appeal pursuant to this Court's Rule 16.1(b) if it appears that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed upon below. The Court should dismiss this appeal pursuant to that rule.

In Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969), this Court held that if a state's highest court has failed to pass upon a federal question, it will be presumed that the issue was not properly presented to the state courts unless the aggrieved party can demonstrate to the contrary. This Court will not undertake

to review what the court below has not decided, Walters v. City of St. Louis, 347 U.S. 231, 74 S. Ct. 505, 98 L. Ed. 660 (1954).

In the instant case, the City was informed at the outset of the litigation that N.J.S.A. 34:13A-21 might be dispositive of the duration clause's validity. Nevertheless, the City failed to challenge that statute's constitutional validity in the proceedings before the Commission or the Superior Court. The Commission and the Superior Court properly proceeded on the assumption -- confirmed by New Jersey's Attorney General -- that there was no constitutional issue in the case. As the City concedes in its Jurisdictional Statement (p. 10), the constitutional question was not raised until its petition for certification to the Supreme Court

of New Jersey. As a result of the City's failure to raise its constitutional issue in a proper and timely manner, none of the decisions and orders below discussed its constitutional claim and indeed none of the decisions and orders cited Art. I, Sec. 10 of the United States Constitution.

The raising of the constitutional issue for the first time before the Supreme Court of New Jersey came too late to preserve the question for review by this Court. The Supreme Court of New Jersey is not bound to consider constitutional issues not raised in inferior courts. See, Deerfield Estates Inc. v. Township of East Brunswick, 60 N.J. 115 (1972) and Domestic Fuel.Co. v. American Petroleum Corp., 6 N.J. 538 (1951). The New Jersey Supreme Court's refusal to review the constitutional issue is consistent with this Court's holdings

that a claimed denial of a federal right is not reviewable in the U.S. Supreme Court where the State court's basis for refusing to consider the claim is that the issue was not properly raised at trial or on appeal as required by state practice. Louisville and Nashville R.R. Co. v. Woodford, 234 U.S. 46, 34 S. Ct. 739, 58 L. Ed. 1202 (1914). See also, Pennsylvania R.R. Co. v. Illinois Brick Co., 297 U.S. 447, 56 S. Ct. 556, 80 L. Ed. 796, reh. den. 297 U.S. 728, 56 S. Ct. 666, 80 L. Ed. 1011 (1936).

Not only has the constitutional claim raised by Appellant not been passed upon below, but there is also a lack of any reference to the claim in the record. A claim raised in a writ of error (or in this case, petition for certification) to an appellate court is

not part of the record of the case, Warfield v. Chaffee, 91 U.S. 690, 1 Otto 690, 13 L. Ed. 383 (1875). Thus, the City has violated both the requirement that the issue raised to the U.S. Supreme Court be passed upon below and the requirement that it be contained in the record below. Accordingly, there is no jurisdiction over the appeal.

The Appellant's failure to raise the issue in a timely and proper manner, the absence of a decision below on the merits of the constitutional question, and the barrenness of the record with respect to the issue require dismissal of the instant appeal. East Tennessee V. & G Railway Co. v. Frazier, 139 U.S. 288, 11 S. Ct. 517, 35 L. Ed. 196 (1891).

POINT II: THE APPEAL SHOULD BE DISMISSED AS IT IS NOT TAKEN FROM A JUDGMENT OF THE HIGHEST STATE COURT IN WHICH A DECISION COULD BE HAD AS REQUIRED BY 28 U.S.C.A. §1257.

Appellant claims jurisdiction in this Court pursuant to 28 U.S.C.A. §1257(2). That section allows appeals from the "highest state court in which a decision could be had" if the validity of a statute has been sustained against a claim of its repugnancy to the United States Constitution.

The phrase "the highest state court" will not be construed to mean a state's supreme judicial body if review by such a court is unavailable in accordance with state practice. In Largent v. Texas, 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1942), a case Appellant cites, the judgment of a county court was deemed sufficient to satisfy the "highest state court" requirement since Texas

rules prohibited a further appeal based upon the size of the fine levied therein.

In the instant case, however, the Superior Court of New Jersey, Appellate Division was not the highest state court in which a judgment could have been had since New Jersey Rules would have permitted a further appeal as of right to the Supreme Court of New Jersey.[6/] N.J. Court Rules, R. 2:2-1(a)(1) permits an appeal as of right to the New Jersey Supreme Court from final judgments in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or of the State of New Jersey.

Appellant sought review by the New Jersey Supreme Court by way of certification instead of appeal. However, based upon its assertion that the

constitutionality of a state statute was implicated by the decision of the Superior Court, Appellate Division, Appellant could have attempted to proceed by the latter method of review. Even if one assumes that the City could have raised a substantial constitutional question, its failure to attempt to raise that question under R. 2:2-1(a)(1) deprived the Supreme Court of New Jersey of an opportunity to address the question which is now presented for review by this Court. Accordingly, the requirement that a judgment be obtained in a highest court of the state in which review could be had has not been met and jurisdiction under 28 U.S.C.A §1257 is not present.

POINT III: THE CITY LACKS STANDING TO RAISE ITS PATENTLY MERITLESS CONSTITUTIONAL CLAIM SINCE A STATE CANNOT BE HELD TO HAVE VIOLATED THE CONTRACT CLAUSE IN ITS RELATIONSHIP WITH ONE OF ITS POLITICAL SUBDIVISIONS.

N.J.S.A. 34:13A-21 requires public employers to maintain the status quo concerning the terms and conditions of employment of its police and fire employees while interest arbitration proceedings are conducted. The City has argued that the application of this statute, which requires it to adhere to the terms of an expired contract, represents state action impairing the obligtations of a contract between the City and the Association.

There is no substance to this claim as this Court has held that a City, as a political subdivision of the State, has no inherent right of self-government beyond the State's legislative control. For example, in City of Trenton v. State of New Jersey, 262 U.S. 182, 43

S. Ct. 534, 67 L. Ed. 937 (1923), this Court declared:

> The power of the State, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for "governmental purposes" cannot be questioned.
> 262 U.S. at 188 (emphasis supplied).

It is therefore apparent that a State possesses absolute legislative control over the powers and rights of one of its political subdivisions and may act to expand or diminish such rights without infringing Art. I, Sec. 10 of the United States Constitution.

As the State has complete power to control its political subdivisions, the City has no standing to assert its constitutional claim that the State violated its contractual rights by enacting a statute. Only those who have been injured as a result of a denial of constitutional rights can invoke the

jurisdiction of this Court. Voeller v. Neilston Warehouse Co., 311 U.S. 531, 61 S. Ct. 376, 85 L. Ed. 322 (1941).

Finally, even if the City had standing to raise its constitutional claim, it is patently frivolous to assert that a party's contractual rights are violated by requiring all parties to continue to observe the terms of their contract until they agree to change them.

CONCLUSION

The federal question raised in the City's Jurisdictional Statement was not properly or timely presented below and was not passed upon by the highest state court in which a decision could be had. Further, the City lacks standing to raise it and the claim, in any event, is frivolous. There is, therefore, no jurisdiction pursuant to 28 U.S.C.A. §1257, and the Public Employment Relations Commission respectfully requests that its motion to dismiss be granted. In the alternative, it is respectfully requested that this Court enter an order summarily affirming the decision of the Superior Court of New Jersey, Appellate Division, which affirmed and enforced the decision and order of the

Public Employment Relations Commission.

Respectfully submitted,

ROBERT E. ANDERSON, JR.,
GENERAL COUNSEL
PUBLIC EMPLOYMENT RELATIONS
COMMISSION

By: Don Horowitz
DON HOROWITZ
Deputy General Counsel

Arnold Zudick
ARNOLD H. ZUDICK
Hearing Examiner

(footnotes follow)

1/ Prior to commencing negotiations, the City unilaterally removed a benefit which had been negotiated in the prior agreement. After the Association filed an unfair practice charge with the Commission, the City restored the benefit and the charge was withdrawn prior to any decision by the Commission.

2/ The proceedings set forth in this Act empower the Commission to resolve contract disputes between police and fire employees and their public employers through compulsory interest arbitration procedures described in the Act and in administrative rules adopted by the Commission, N.J.A.C. 19:16-1-1.1, et seq. The provisions of the Act are mandatory in all municipalities which have not reached agreements with their public safety employees within a stated period prior to municipal budget submissions.

3/ This rule provides:

> Any party to an appeal may move the Appellate Division for summary disposition in accordance with R. 2:8-1(a). Such motion shall demonstrate that the issues on appeal do not require further briefs or full record. The motion may be filed at any time after filing of the notice of appeal but unless leave is otherwise granted not later than 25 days after the filing of respondents' briefs. The court may deny the motion; may grant it by affirming, reversing or modifying the judgment or order appealed from on the record before it or on such further record as it may direct; or may take such other action in respect of limitation of the issues or otherwise as it

deems appropriate. The court may summarily dispose of any appeal on its own motion at any time, and on prior notice to the parties. A motion for summary disposition shall toll the time prescribed by these rules for further perfection of the appeal.

4/ This section provides:

> The Commission shall have the power to apply to the Appellate Division of the Superior Court for an appropriate order enforcing any order of the commission issued under subsection c. or d. hereof, and its findings of fact, if based upon substantial evidence on the record as a whole, shall not, in such action, be set aside or modified; any order for remedial or affirmative action, if reasonably designed to effectuate the purposes of this act, shall be affirmed and enforced in such proceeding.

5/ "PERCma_" refers to the Appendix attached to this brief.

6/ This argument assumes that the City's constitutional claim is substantial enough to entitle the City to an appeal as of right to both the New Jersey Supreme Court and this Court. For the reasons set forth in POINT III of this brief, the Commission believes that the alleged constitutional issue is frivilous and that the New Jersey Supreme Court would have dismissed any attempt to file an appeal as of right. The City is not, however, entitled to press the instant appeal as of right unless it can convince this Court that the case presents a substantial constitutional question and if it can

do that then the City had an obligation, which it failed, to present that claim to the New Jersey Supreme Court first.

lma

APPENDIX A

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
Richard J. Hughes Justice Complex
C.N. 112
Trenton 08625
(609) 292-6058

October 18, 1983

Mrs. Elizabeth McLaughlin, Clerk
Superior Court, Appellate Division
CN 006
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Re: City of Lambertville v.
Lambertville Policemen's
Assoc. - Dkt. No. A-447-83T2
Motion No. M-

Dear Mr. McLaughlin:

This is to advise you and the parties that the Attorney General does not intend to file a brief in this matter or to otherwise actively participate in the appeal, including the disposition of the motion and cross-motion in this case, since P.E.R.C.'s General Counsel is representing the agency and since there is no challenge to the constitutionality of any statute or regulation of the State.

Very truly yours,

IRWIN I. KIMMELMAN
Attorney General of New Jersey

By: s/ Michael L. Diller
Michael L. Diller
Deputy Attorney General

MLD:caz
cc: Don Horowitz, Esq.
Joseph F. Shanahan, Esq.

APPENDIX B

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

July 16, 1984

Don Horowitz, Esq.
Arnold H. Zudick, Esq.
Public Employment Relations Commission
429 East State Street
Trenton, New Jersey 08608

RE: City of Lambertville v. Lambertville
Policemen's Association
No. 83-2037

Gentlemen:

Your request received July 16, 1984 for an extension of time within which to file a response to the jurisdictional statement in the above-entitled case has been granted and your time has been extended to and including August 10, 1984.

No request for a further extension of time will be entertained by the Clerk.

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By: s/ Francis J. Lorson
Francis J. Lorson
Chief Deputy Clerk

qtb
cc: Joseph F. Shanahan, Esq.
Hon. Irwin I. Kimmelman

APPENDIX C

STATE OF NEW JERSEY

Department of Law and Public Safety

State House Annex

Trenton, N.J. 08625

609 292-4919

Re: Special Counsel - Public Employment Relations Commission

Pursuant to N.J.S.A. 52:17-13, Don Horowitz, Esq., who is a member of the Bar of the State of New Jersey, is hereby appointed as Special Counsel to render legal advice to the Public Employment Relations Commission and to represent them in all proceedings or actions pending before the courts.

Since Don Horowitz, Esq., is a full time employee of the Public Employment Relations Commission with the title of Deputy General Counsel to the Commission, there will be no additional compensation for legal services

in connection with this Special Counsel appointment.

s/ William F. Hyland

WILLIAM F. HYLAND
ATTORNEY GENERAL

The foregoing appointment as Special Counsel is hereby approved.

s/ Brendan T. Byrne

BRENDAN T. BYRNE
GOVERNOR

DATED: December 30, 1976